Supreme Court, U.S.
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(8)

No. 86-800

IN THE

Supreme Court of the United States

October Term, 1986

EDUARDO M. LUCERO, et al.,

Appellants,

v.

OFFICER JAMES "BUSTER" SNYDER, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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15 pp

QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals erred by dismissing appellants' appeal because appellants failed to obtain a transcript either by paying for it or by proceeding *in forma pauperis*.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Tenth Circuit: Elaine S. Gonzales, Rudolfo "Gorky" Gonzales, Eduardo M. Lucero, Eduardo D. Lucero, Mary L. Lucero, Cristobal Leis Yepes, Eddy Manuel Yepes and Reba L. Yepes, the appellants herein, and James H. Snyder, Richard Fisher, Thomas Coogan and the City and County of Denver, the appellees herein.

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Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, appellees move to dismiss or affirm the appeal filed on behalf of appellants. The motion to dismiss is grounded on the fact that no proper question issuing from a circuit court has been presented pursuant to 28 U.S.C. § 1254. The motion to affirm is grounded on the fact that the question presented is so unsubstantial as not to need further argument.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 10(b)(2) provides that "[i]f the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

In its totality, Tenth Circuit Rule 15(a) states that "[w]hen an appellant acting *pro se* or through retained counsel in either a docketed or undocketed appeal fails to comply with the Federal Rules of Appellate Procedure or the Tenth Circuit Rules, the clerk shall notify the appellant that unless the default is remedied within ten days from the date of the notice, the appeal will be dismissed for want of prosecution. If the appellant fails to comply within the ten-day period, the clerk shall enter an order dismissing the appeal for want of prosecution, and shall issue a certified copy thereof as and for the mandate. The appellant shall not be entitled to remedy the default after the appeal is dismissed except by order of court."

In pertinent part, 28 U.S.C. § 1915(a) states that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith."

Finally, in pertinent part, 28 U.S.C. § 1254 provides that this Court has appellate jurisdiction over a circuit court "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . . "

STATEMENT

The jurisdictional issue posed by this appeal is the culmination of the following procedural developments in the Tenth Circuit:

1. Appellant Eduardo M. Lucero, who has taken the lead in the instant proceeding, was one of approximately 40 of the original 51 plaintiffs who individually appealed. He filed his Notice of Appeal with the Tenth Circuit on January 25, 1985. Eduardo M. Lucero paid the docket fee in appeal No. 85-1179 (Appendix A).

2. On June 27, 1985, the Clerk of the Tenth Circuit in the appeal of Elaine S. Gonzales, No. 85-1178, denied without prejudice her motion for the free trial transcript, and directed her to apply for such transcript in the first instance with the district court (Appendix B).

3. On January 13, 1986, the district court denied all appellants' motions for a free transcript of trial and held that there was "no merit to the appeal" (Appendix C).

4. The final ruling from the Tenth Circuit occurred on July 3, 1986, in which the Tenth Circuit dismissed the appeal pursuant to Tenth Circuit Rule 15(a) for failure to prosecute (Appendix D).

5. The basis for the dismissal by the Tenth Circuit Court of Appeals does not present a ground for review of a federal court's decision under 28 U.S.C. § 1254. Nonetheless, if this Court considers jurisdiction under *certiorari* review pursuant to 28 U.S.C. § 2103, jurisdiction should be denied because the question presented is so unsubstantial as not to need further argument.

ARGUMENT

The only record before the Tenth Circuit Court of Appeals was the opinion by District Court Judge John L. Kane, reprinted in the appendix attached to appellants' jurisdictional statement. The district court succinctly set forth the issues raised below, none of which concerns a question of importance to this Court. The questions concerned alleged impropriety in evidentiary rulings, the attorney's *voir dire* during jury selection, jury instructions that were not tendered, and rulings on motions for verdicts. In addition, appellants raised issues of whether the attorneys that plaintiffs chose in their civil action were so ineffective as to require a new trial, whether there was any evidence that the City had a policy of harrassing the Chicano community, whether a good faith defense is available in a claim under the civil rights act, and whether newly acquired evidence requires a retrial.

Appellants have made no showing that either the district court or the circuit court abused its discretion in denying appellants' motion for a free transcript. The trial court certified under 28 U.S.C. § 1915(a) that the appeal lacked merit and did not present a substantial question,

thus precluding a free transcript under § 1915(a). *See* Appendix C.

The government had no requirement to provide a free transcript in such a civil case and properly dismissed the case for lack of prosecution under Tenth Circuit Rule 15(a) (Appendix D). *See Maloney v. E. I. DuPont de Nemour & Co.*, 396 F.2d 939 (D.C. Cir. 1967). Because the facts do not raise any matter of importance, review should be denied.

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APPENDIX A

MAY TERM – June 27, 1985

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUERA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES, EDUARDO M. LUCERO, EDUARDO D. LUCERO, MARY LUCERO, RUDOLFO GONZALES,	)	Nos. 85-1178, 85-1179 85-1180, 85-1181 & 85-1184
Plaintiffs-Appellants,	)	
v.	)	
OFFICERS JAMES "BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of defendants' motion to dismiss the captioned appeals and plaintiffs' response thereto. The motion is denied.

The grant of leave to proceed *in forma pauperis* in No.

85-1178 and the reinstatement of appeal Nos. 85-1180 and 85-1181 were orders entered by this panel, not by the clerk. *See* 10th Cir. R. 14. Contrary to counsel's belief, appeal No. 85-1179 was not "mistakenly never dismissed." A proper motion for leave to proceed *in forma pauperis* was submitted to his court. After the motion was denied, appellant paid the docket fee.

The order of reinstatement in appeal No. 85-1184, although entered by the clerk, was unopposed by defendants, who were advised of both the motion to reinstate and of the reinstatement two months before the motion to dismiss was filed. Furthermore, under the circumstances, the reinstatement is not without the jurisdiction of the clerk. 10th Cir. R. 13; Fed. R. App. P. 27.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

MAY TERM – June 27, 1985

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUERA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES,	)	No. 85-1178
Plaintiff-Appellant,	)	
v.	)	
OFFICERS JAMES " BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of plaintiff's motion for a free trial transcript. This court has granted plaintiff leave to appeal *in forma pauperis*.

The standard for directing payment of a transcript under 28 U.S.C. § 753(f) is not identical to that which permits the determination to grant leave to proceed on

appeal *in forma pauperis*. *Linden v. Harper & Rowe, Inc.*, 467 F. Supp. 556 (S.D.N.Y. 1979). Further, in the interest of judicial administration, the motion should be made in the first instance to the district court. *See Morrell v. United States*, 290 F.2d 208 (9th Cir. 1961); King v. Carmichael, 268 F.2d 305 (6th Cir. 1959), *cert. denied*, 361 U.S. 968 (1960); *Jaffe v. United States*, 246 F.2d 760 (2d Cir. 1959); *Ortiz v. Greyhound Corp.*, 192 F. Supp. 903 (D. Md. 1959).

The motion is accordingly denied, without prejudice.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 81-K-1386

ROBERTO LUERA, et al.

Plaintiff[s],

vs.

OFFICER JAMES "BUSTER" SNYDER, et al.,

Defendant[s].

MINUTE ORDER — JUDGE KANE

Judge John L. Kane, Jr. ORDERS:

Motion for Clarification Regarding Denial of Transcript is GRANTED. I have already ruled. My ruling is applicable to all plaintiffs.

1. There is no merit to the appeal.

2. There is no adequate showing of indigency.

3. There is no provision for the payment of transcripts in civil cases.

4. I am without jurisdiction to grant relief.

Mary Clark, Secretary DATE: January 13, 1986

APPENDIX D

MAY TERM – July 3, 1986

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUEŔA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES, EDUARDO M. LUCERO, MARY LUCERO, RUDOLFO GONZALES, GERALDINE I. GONZALES, VAN S. LUCERO, GAIL LUCERO, NITA GONZALES, GINA G. ALVARADO,	)	Nos. 85-1178, 85-1179 85-1181, 85-1184 85-1185, 85-1186 85-1187, 85-1189 85-1191
Plaintiffs-Appellants,	)	
v.	)	
OFFICERS JAMES "BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellees' motion to dismiss these appeals for failure of appellants to comply with Fed. R. App. P. 10, *i.e.*, to order a transcript or to agree to a statement of the evidence or the record. We have long obliged pro se litigants to follow the rules. *Bradenburg v. Beaman*, 632 F.2d 120 (10th Cir. 1980), *cert. denied*, 450 U.S. 984 (1981).

Appellants were given twenty days to remedy their noncompliance with Fed. R. App. P. 10 and 11 and 10th Cir. R. 6 and 7, but have failed to do so.

Accordingly, these appeals are dismissed for failure to comply with 10th Cir. R. 15(a).

The mandates shall issue forthwith.

ROBERT L. HOECKER, Clerk